

89-17309
NO. _____

MAY 8 1990

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SUSANNE C. FINK
Petitioner.

v.

PETER FINK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT

CHESTER LEO SMITH
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Questions Presented

(1) Whether State law can limit the fiduciary duties of a stock broker under **The Securities Exchange Act of 1934** as amended so such "registered representative" can be held by State law to have a lawful right to conceal assets from the legal claims of brokerage clients by recording title to a parcel of real property in the name of his spouse as her sole and separate property.

(2) Whether State family-property law does "major damage" to "clear and substantial" federal interests under **The Securities Exchange Act of 1934** (and its disclosure and financial reporting provisions) and must be pre-empted because Congress has so "positively required by

direct enactment" of the said **Securities Exchange Act** - where it is adjudicated by the State Court that a stock broker admittedly violating said Act still retains a community interest in real property found by the Trial Court decision to have been recorded in the name of the petitioner wife as her separate property "for the purposes of avoiding or defrauding creditors" who were broker clients of the husband.

(3) Whether the Court of Appeal of the State of California in a divorce proceeding is correct in limiting the duties of stock brokers so as now to permit such stock broker to set aside the recorded deed as void and to have it adjudicated he has a community interest in such real property asset intentionally concealed from

his broker clients because (A-16) the Court of Appeal holds "... Susanne's reliance on the Security Exchange Act of 1934 and related cases, e.g. Boruski v. Securities and Exchange Commission (2d Cir. 1965) 340 F.2d 991 is patently misplaced. Peter's duty, as a broker, under that Act is owed to his clients, not to his spouse, Susanne."

(4) Whether the holding of the Court of Appeal is a serious breach in the integrity of **The Securities Act of 1933** (15 U.S.C., §77a et seq.) and **The Securities Exchange Act of 1934** (15 U.S.C., §78a et seq.) since the decision denies that the duty of registered brokers is to the Acts of Congress and that brokers have a duty at all times to comply with all requirements of said **Securities Acts**.

II. LIST OF PARTIES

Petitioner (and Appellant) is Susanne Fink. She was the "respondent" at the trial court level, and then appealed.

Respondent is Peter Fink. He was the "petitioner" at the trial court level.

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To the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:

Petitioner Susanne Fink respectfully prays a writ of certiorari issue to review the decision filed November 22, 1989 (Appendix A) of the Court of Appeal of the State of California.

OPINION BELOW

The opinion below was entered by the Court of Appeal of the State of California, Second Appellate District, on November 22, 1989. A copy thereof is appended as Appendix A. Supreme Court review denied 2/14/90.

JURISDICTION

Jurisdiction is conferred upon this Court by the Supremacy Clause (**Art. VI, cl2**). Also by Federal pre-emption by reason of **The Securities Act of 1933** (15 U.S.C., §77a et seq.) and **The Securities Exchange Act of 1934** as amended (Title 15 U.S.C., 78a et seq.). Also under the legal

doctrines of Hisquierdo v. Hisquierdo, 439 US 572, 59 L Ed 2d 1, 99 S Ct 802. Also 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Article VI,
cl2.

STATEMENT OF THE CASE

The parties married in 1968 and separated in 1982. Peter at all times during the marriage was a stock broker i.e. a licensed registered representative in accordance with the rules and regulations of the New York Stock Exchange and the Securities and Exchange Commission.

Title 15, Section 78o in various provisions proscribes any such person as Peter from making any statement which is false and misleading, or from making a false oath, or engaging in fraudulent concealment, and in the conduct of his business as a broker, or dealer or fiduciary. **Arguendo**, properly interpreted, this should include the proscription of the recordation of a notarized false statement of title to real property for the purpose of concealing assets from brokerage clients.

Peter was, during the marriage, employed first by Shearson Hammill and then by Bear Stearns, both brokerage firms.

Peter filed for dissolution of the marriage in 1984, claiming a community interest in the "Cortez" residence in

Pacific Palisades, purchased in 1975, and always held of title record in the sole name of Susanne as her separate property.

A response was filed by Susanne in 1986.

Trial was in March of 1988. Susanne specifically objected, orally and in writing, at the commencement of the trial, to the introduction of any evidence to vary the terms of the recorded deed as to the Cortez house, including the ground of illegality.

Among the objections of Susanne at trial was the objection (that the oral agreement Peter alleged in pre-trial proceedings and pleadings and his trial

brief) was illegal and unenforceable, including under the terms of the Securities Act of 1934 (e.g. Clerk's Transcript at page 225).

The evidence at trial was that:

Prior to the purchase in 1975 of the Cortez residence, in 1973 a condominium had been purchased and title thereto was recorded in the name of Susanne as her sole and separate property. Peter quitclaimed any interest therein to Susanne. The Court of Appeal stated (A-6 et seq.):

"Peter testified that title to the condo was taken in Susanne's name solely to protect the family because in 1971, two years previous, he had been named as a defendant in a lawsuit for \$50,000 arising from his activities as an employee of Shearson Hammill. At that time his net income was less than \$50,000. He felt threatened by the lawsuit because his employer would not cover any judgment against him. After discussing the problem with Susanne, he placed the title in her

name in order to protect the condo from creditors. Susanne testified that in 1973, she was not aware of the lawsuit against Peter. . . .

"In 1975, Susanne and Peter decided to sell the condo and use the proceeds from the sale as a down payment on the purchase of the Cortez house, because they wanted a larger home. The lawsuit mentioned above had been settled before the purchase of the Cortez house. However, Peter, placed title to the Cortez house in Susanne's name as her sole and separate property in order to protect the family because he had no insurance, feared potential creditors in his business, and was a "shooting duck."^{1/} [See pg. A-15 for footnote One]

"Monthly payments on the Cortez house came primarily from Peter's earnings during the marriage. Peter testified that he never intended to relinquish his interest in the condo and the Cortez house and that Susanne knew this to be the case just as she knew why title had been placed in her name.

"At the conclusion of the trial, the court found that the Cortez house was the community property of Susanne and Peter and that title had been placed in Susanne's name pursuant to the agreement of Susanne and Peter solely to avoid or defraud creditors. . . ."

Judgment was entered June 7, 1988, awarding the Cortez residence to Susanne and Peter, as tenants in common. The Trial Court did not specify any reason for its judgment as to the Cortez residence other than the simple reality of the finding that the title was placed in Susanne's name "for the purpose of avoiding or defrauding creditors" as a sufficient explanation unto itself for setting aside the deed.

There was no evidence at trial that there was any creditor's lien against Peter that would attach to the property if Peter was awarded an interest in title or that

Peter intended to use any interest he was awarded to satisfy any creditor.

There was a timely appeal. In the Opening Brief to the Court of Appeal, the primary points raised by Susanne concerned the invalidity of the agreement, including its violation of Federal law. This is shown by POINTS ONE AND TWO AND THREE of the Table of Contents of the Opening Brief (of Susanne) on Appeal, to wit:

I. The Clear Public Policy Of The Security Exchange Act Of 1934 (As Amended To Date) Mandates The Court Follow Federal Law By Holding This Is An Agreement To Defraud Clients Of A Security Broker And As Such Is Abhorrant And Unenforceable As A Criminal Agreement Intended To destroy A Primary Purpose Of The Security Exchange Act

II California Law Bars Enforcement Of An Illegal Agreement By A Fiduciary To Defraud His Clients.

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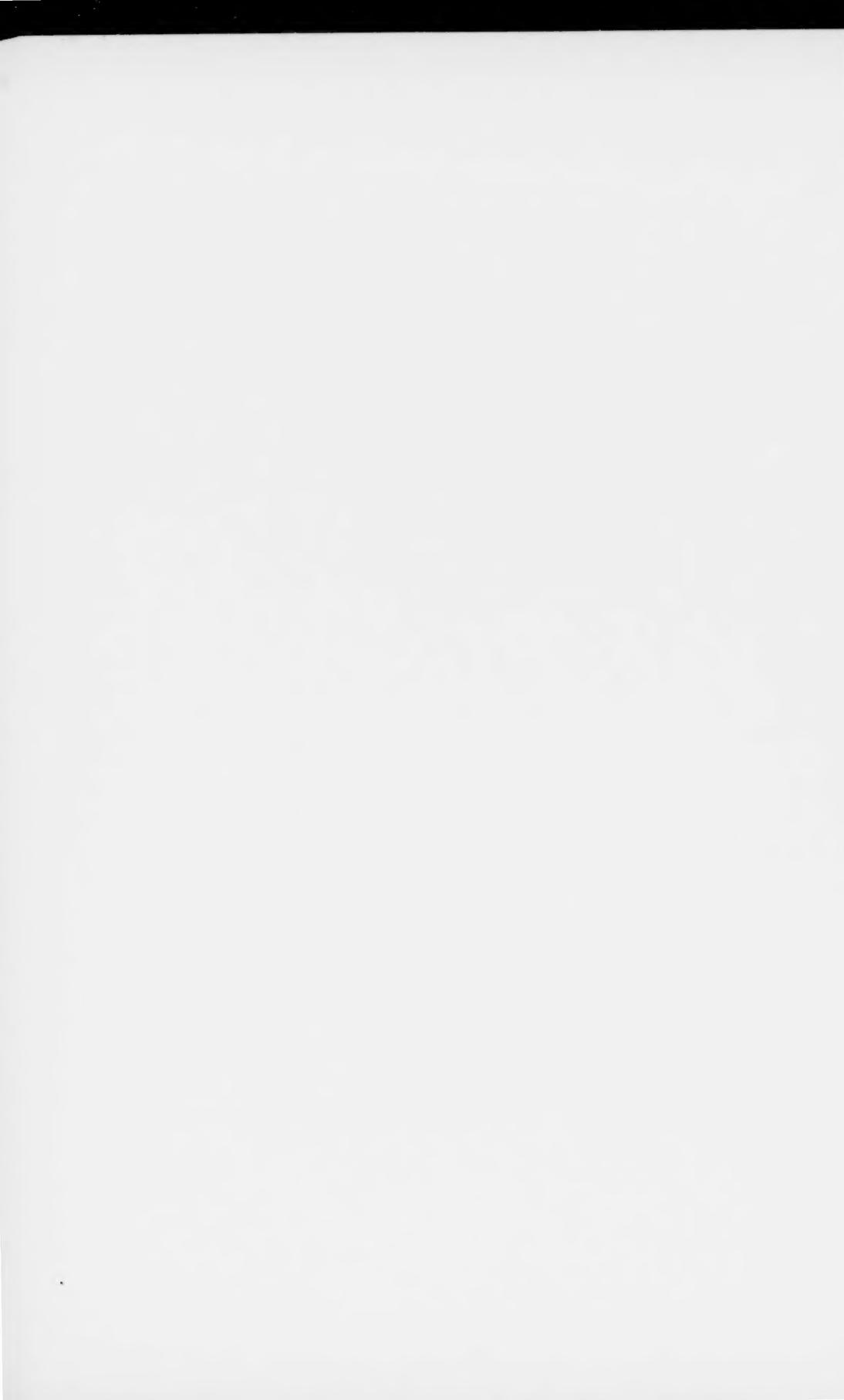
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III. The Invalidity Of The Original Agreement in 1973 (For The Purchase Of The First Residence) Carried Through And Rendered Invalid The Second Agreement Of 1975 (For The Purchase Of The Second Residence) Since The Evidence Of Respondent Was That On Both Occasions Respondent Intended This As a Scheme To Defraud His Fiduciary Clients

IV. Bovard v. American Horse Enterprises

V. The Law Clearly Bars Enforcement Under The Restatement Test

VI. The Court In any Event Erred In Finding The Residence Was Community Instead Of The Separate Property Of Susanne



The Petitioner in her Opening Brief also relied on, for example, Section 78b of Title 15, to wit:

". . . transactions in securities . . . are affected with a national public interest . . . to impose requirements necessary to make such regulation and control reasonably complete and effective . . . to insure the maintenance of fair and honest markets . . ."

And Title 15, Section 78f:

"...acts or practices inconsistent with just . . . principles of trade . . ."

(E) (4) . . . has willfully made or caused to be made in any application . . . any statement which was at the time, in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to



state in any such application, report, or proceeding any material fact which is required to be stated therein."

78j. Manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange..."

78o. Registration and regulation of brokers and dealers...

"(3) ... to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers.."

"(4) ... has wilfully made ... any statement ... false or misleading with respect to any material fact, or has



omitted to state in any such ... report any material fact which is required to be stated therein . . . the taking of a false oath, the making of a false report ... or conspiracy to commit any such offense ..."

78q. Records and reports

"(e) (1) (A) Every registered broker or dealer shall annually file with the Commission a balance sheet and income statement certified by an independent public accountant, prepared on a calendar or fiscal year basis, and such other financial statement which shall, as the Commission specifies, be certified and information concerning its financial condition as the Commission, by rule may prescribe as necessary or appropriate in the public interest or for the protection of investors."

The Court of Appeal addressed the primary contention of Susanne, as to illegality, only in Footnote Two (A-16) of its decision as follows:

"We reject, as patently unsound, Susanne's claim that the Cortez house must be deemed to be her separate property on the theory that to characterize it as community property would impermissibly reward Peter's illegal attempt to defraud creditors. To the contrary, if the property were deemed to be Susanne's separate property, then creditors, if any, would be defrauded since Peter's interest in the house would be immune from creditors' liens. Moreover, Susanne's reliance on The Security Exchange Act of 1934 and related cases, e.g., Boruski v. Securities and Exchange Commission, (2d Cir. 1965) 340 F.2d 991 is patently misplaced. Peter's duty, as a broker, under that Act is owed to his clients, not to his spouse, Susanne." (Emphasis added)

Boruski, supra, found that a willful failure to comply with the Commission's regulations requiring broker-dealers to

submit reports certified by certified public accountants or qualified public accountants warranted orders revoking his broker-dealer registration, expelling him from national association of securities dealers and denying him registration as an investment adviser.

The basic contention of Susanne was that the fact Peter admittedly violated his fiduciary duty to the Federal Statute negated the jurisdiction of the Court to rescind the terms of the recorded deed. That this duty to the Statute exists regardless of whether Peter has any clients in fact or whether Peter defrauded any clients in fact.

In the Petition for Rehearing (A-22) it was observed there was no reported testimony that creditors have recorded

creditors liens or that any creditor has been joined or that any publication of any type has taken place to alert brokerage clients of Peter of a right to claim an interest in the property. Peter has an absolute ability to conceal the property again the instant he has a final adjudication of title, leaving appellant solely vulnerable if she is the only one in record title to any real property.

The Court of Appeal in this footnote found then this limitation of duty of a fiduciary to be, really, the state common law - which concept of the law would be applicable not only to e.g. lawyers and accountants (whose duty is under the Codes of the State) but also applicable to stock brokers registered/licensed under the said Federal Statute.



The Trial Court had made no statement of reasons. The Court of Appeal for the first time raised this limitation of duty (to clients) as a matter of in essence a State common law concept, conceivably for the first time ever stating in California in an appellate decision the traditional pragmatic view that permits fiduciaries to conceal property from creditors in the name of spouses and others, and then, many years later, cleanse the concealed asset into legitimated view in this type of court proceeding.

Susanne was not a broker or a lawyer or an accountant, aware by law of fiduciary responsibilities. Peter was the broker. Peter was presumed to be aware of his responsibilities -- **to the Federal Statutes that licensed him.**



ARGUMENT

The following Federal authority defines this uphill battle. In Hisquierdo v. Hisquierdo, 439 US 572, 59 L Ed 2d 1, 99 S Ct 802, it is stated:

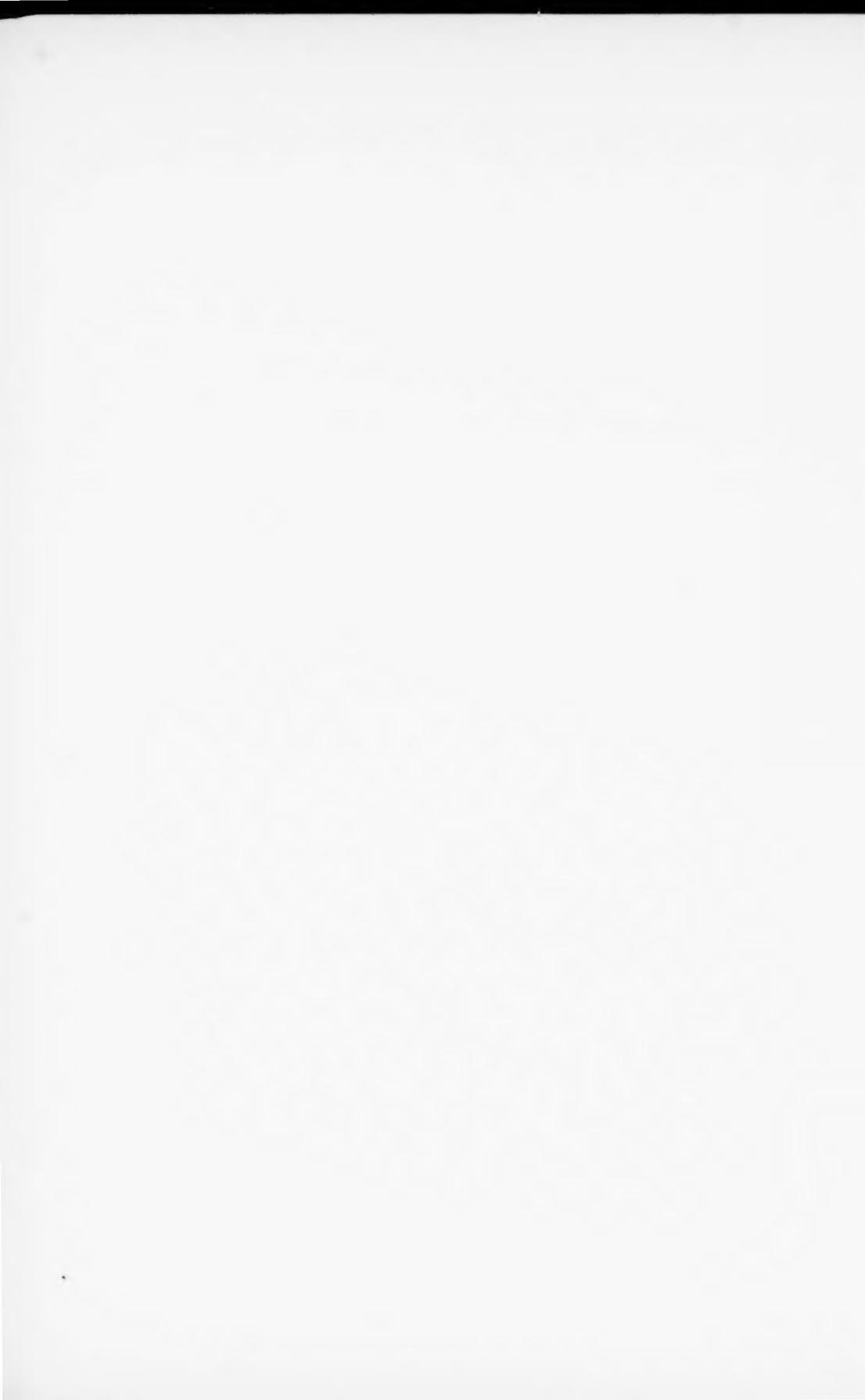
"Insofar as marriage is within temporal control, the States lay on the guiding hand. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States". In re Burrus, 136 US 586, 593-594, 34 L Ed 500, 10 S.Ct. 850 (1890). . . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment"



that state law be pre-empted, Wetmore v. Markoe, 196 U.S. 68, 77,49 L.Ed 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966)."

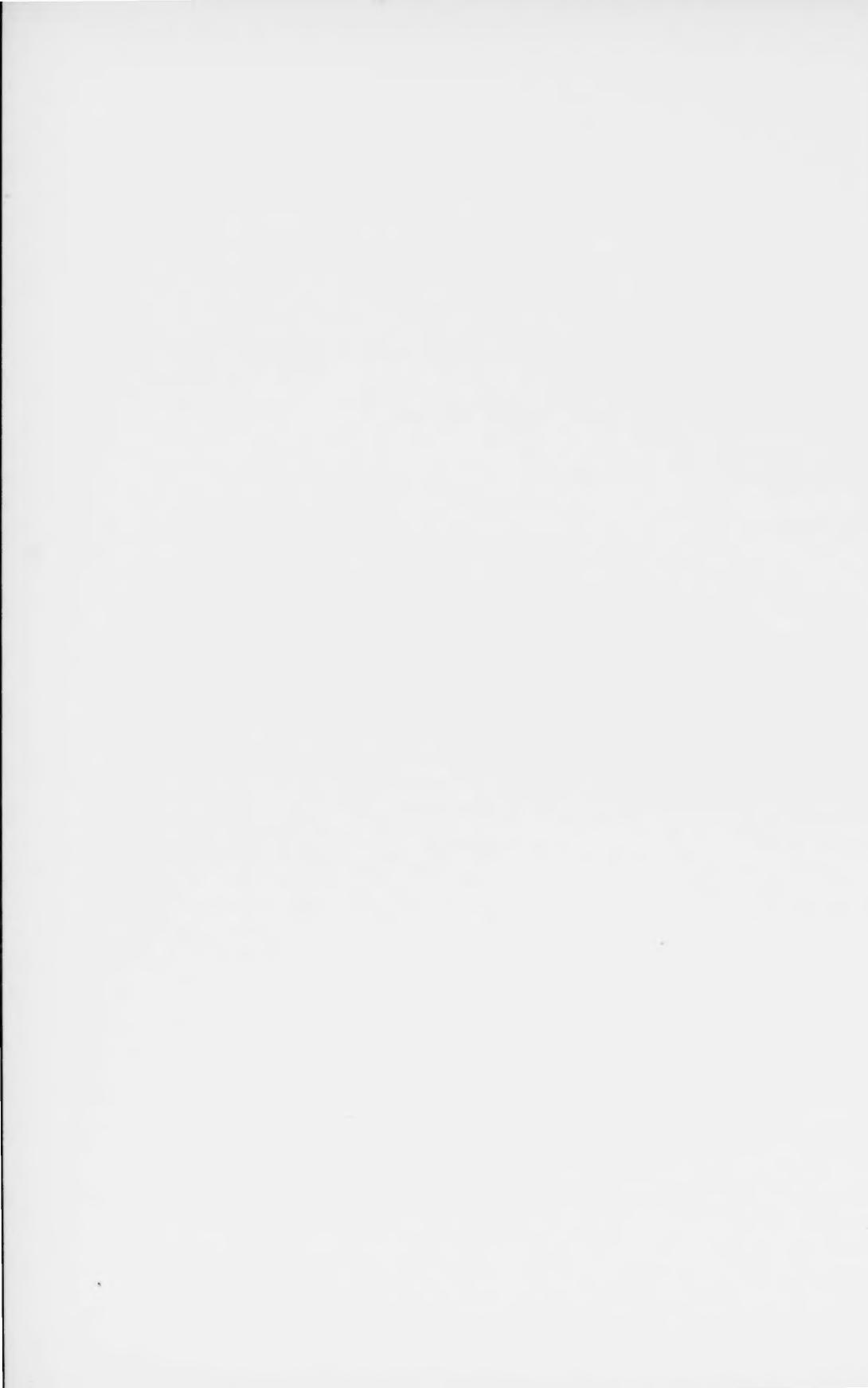
POINT I

Whether State law can limit the fiduciary duties of a stock broker (as such duties are defined under Title 15, Rule 78o-1 United States Code as to a licensed registered representative) so such broker can be held by the State Court to have a lawful right to conceal assets from the legal claims of brokerage clients by recording title to a parcel of real property in the name of his spouse as her sole and separate property?



The State family-property law (upon which the decision of the Court filed November 22, 1989 is based) does "major damage" to "clear and substantial" federal interests under The Securities Exchange Act of 1934 (and its vital regulation of registered representatives) and must be overridden. The decision permits registered representative brokers to conceal assets from required disclosure (in this instance by placing assets in the name of a spouse).

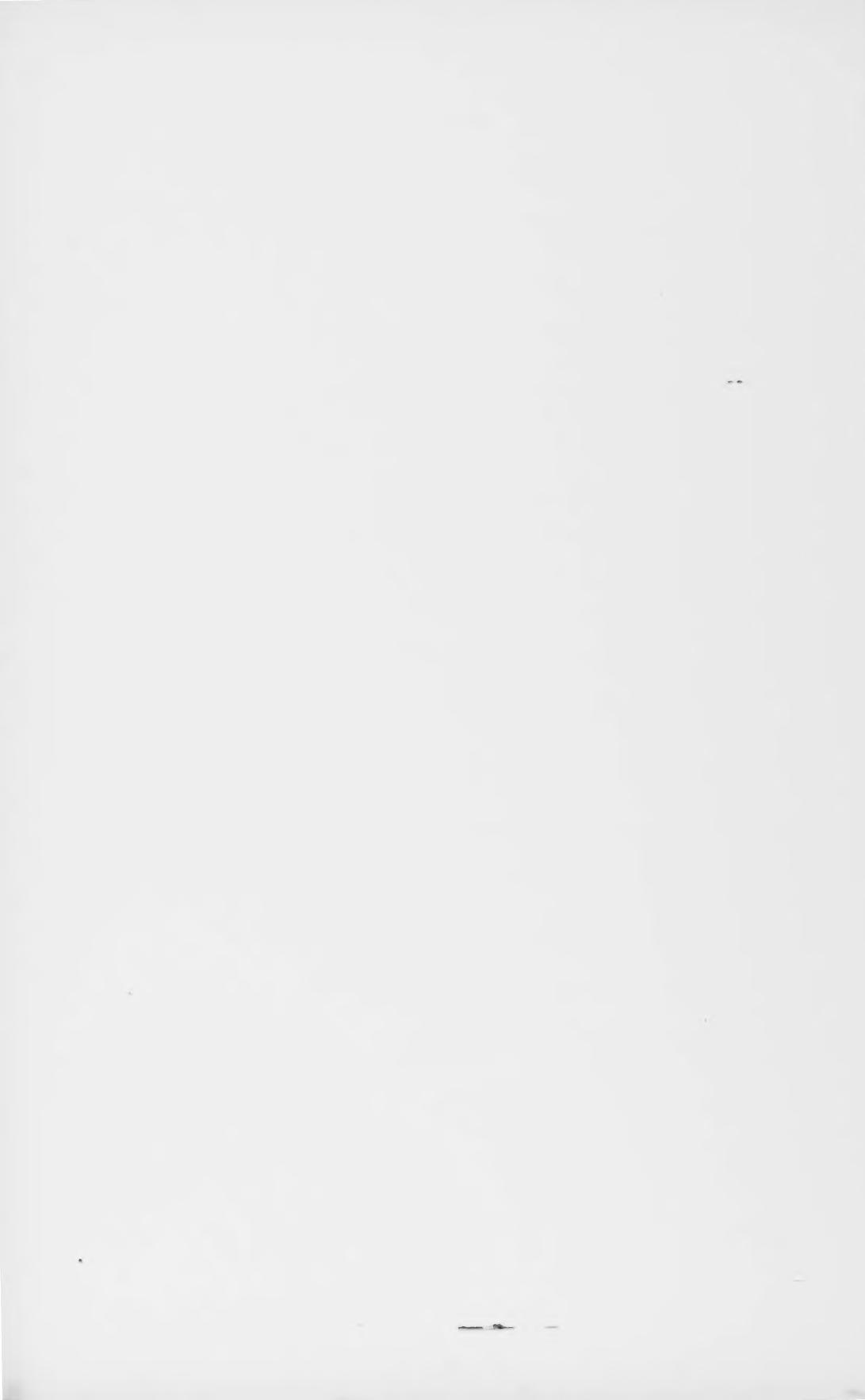
The gap is enormous and has only the dubious virtue that it encourages marriage. It also, later, encourages divorce.



POINT II

Whether State family-property law does "major damage" to "clear and substantial" federal interests under The Security Exchange Action of 1934 and its disclosure and financial reporting provisions) and must be overridden because Congress has in essence so "positively required by direct enactment" of the said Securities Act of 1934, and also because of the Supremacy Clause (Art. VI, cl2) - where it is adjudicated by the State Court that a broker admittedly violating said Act still retains a community interest in real property found to have been recorded in the name of the petitioner wife as her separate property "for the purposes of avoiding or defrauding creditors" who were broker clients of the husband.

The State Court has presented no sound reason for such a blow to the integrity of the Federal statutes. There is none except that it is convenient to avoid addressing a problem that should have some other solution that would discourage repetition.



POINT III

Whether the Court of Appeal of the State of California in a divorce proceeding is correct in limiting the duties of stock brokers so as now to permit such stock broker to set aside the recorded deed as void and to have it adjudicated he has a community interest in such real property asset intentionally concealed from his broker clients ...

The decision:

(a) Assumes without any evidence that there are "creditors' liens" when there are none testified to by any witness, and assumes in reality that any creditors have had notice so they could initiate joinder proceedings, and

(b) Assumes that a broker who openly alleges he has hidden his property in his wife's name for 10 years will now use this property to pay any creditors instead of immediately hiding it again, and

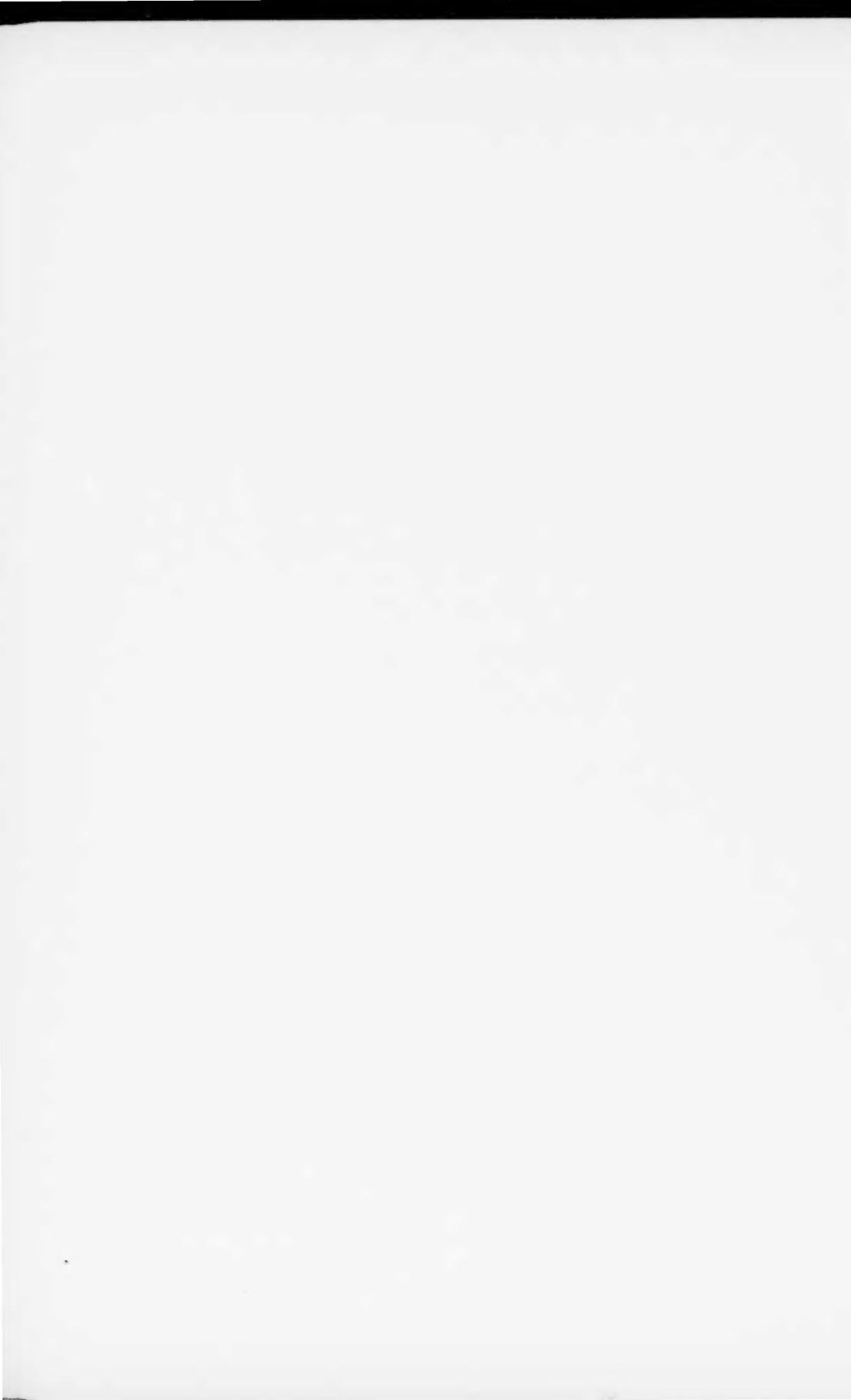
(c) Accepts as valid State family-property law the legal conclusion that a stock broker fiduciary can at any time violate the SEC Act for any reason, whether or not such registered broker has now or has ever had a client and as if the said Security Exchange Act can safely be so limited in its scope by limiting the duties of the registered representatives to actual known clients without defeating entirely its primary stated purposes, and opening a vast gap for evasion of the Act.



POINT IV

Whether the holding of the Court of Appeal is a serious breach in the integrity of The Securities Exchange Act since the decision denies that the duty of registered brokers is to the Act and that brokers have a duty at all times to comply with all requirements of said Act.

The holding of the Court is simple - a fiduciary broker can hide his assets in his wife's name throughout his career, then get a divorce, and retrieve one half of the assets hidden. It is intriguing, wrong, dangerous, and should be reversed.

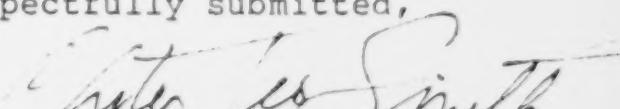


CONCLUSION

This Court should grant certiorari,
and the judgment below should be reversed.

Respectfully submitted,

By


CHESTER LEO SMITH

Attorney for Appellant
Susanne C. Fink

ANN SMITH:
Associate Counsel



APPENDIX A

A-1 Decision of the Court of Appeal
 filed November 22, 1989

A-17 Petition for Rehearing to the
 Court of Appeal denied 12/18/89

A-31 ORDER DENYING REVIEW OF 2/14/90
 OF SUPREME COURT STATE OF
 CALIFORNIA



A-1

FILED NOVEMBER 22, 1989

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of PETER)	B036724
)	
and SUSANNE C. FINK.)	
)	(Super/Ct.
)) D. 129206)
)	
PETER FINK,)	
)	
Respondent)	
)	
and Respondent,)	
)	
v.)	
)	
SUSANNE C. FINK,)	
)	
Plaintiff)	
)	
and Appellant.)	
)	

Schenck & Edelman, John D. Schenck and Emily Shappell Edelman for Respondent.

Susanne C. Fink (Susanne) appeals from the "Further Judgment" entered June 7, 1988, awarding the family residence to herself and Peter Fink (Peter), as tenants in common.

We affirm the judgment.

THE QUESTION ON APPEAL

This appeal turns on whether there was substantial evidence to support the trial court's finding that the family residence at 1342 Avenida de Cortez, Pacific Palisades, (the Cortez house) "is the community property of [Susanne and Peter Fink]. The title was placed in [Susanne's] name for the purpose of avoiding or defrauding creditors," and whether the court erred in ordering that both of the



parties "are awarded one-half interest in said property as tenants-in-common."

FACTUAL AND PROCEDURE STATEMENT

Susanne and Peter were married on December 18, 1968, and were separated on May 29, 1982. Their two children, Peter Todd Fink and Tamara Renee Fink, were born respectively on November 22, 1970 and September 16, 1977.

On November 2, 1984, Peter filed a petition for dissolution of marriage from Susanne. Susanne filed her response on February 4, 1986.

Trial was held on March 11, 14, and 15, 1988. The basic issue raised was whether the Cortez house was the separate property of Susanne or was community property of Susanne and Peter. On this

issue the following evidence was presented:

Prior to acquisition of the Cortez house, Peter and Susanne resided in a condominium unit located at 1305 Palisades Drive, Pacific Palisades (the condo). The condo was purchased in 1973 for \$52,000 with an \$11,000 down payment.

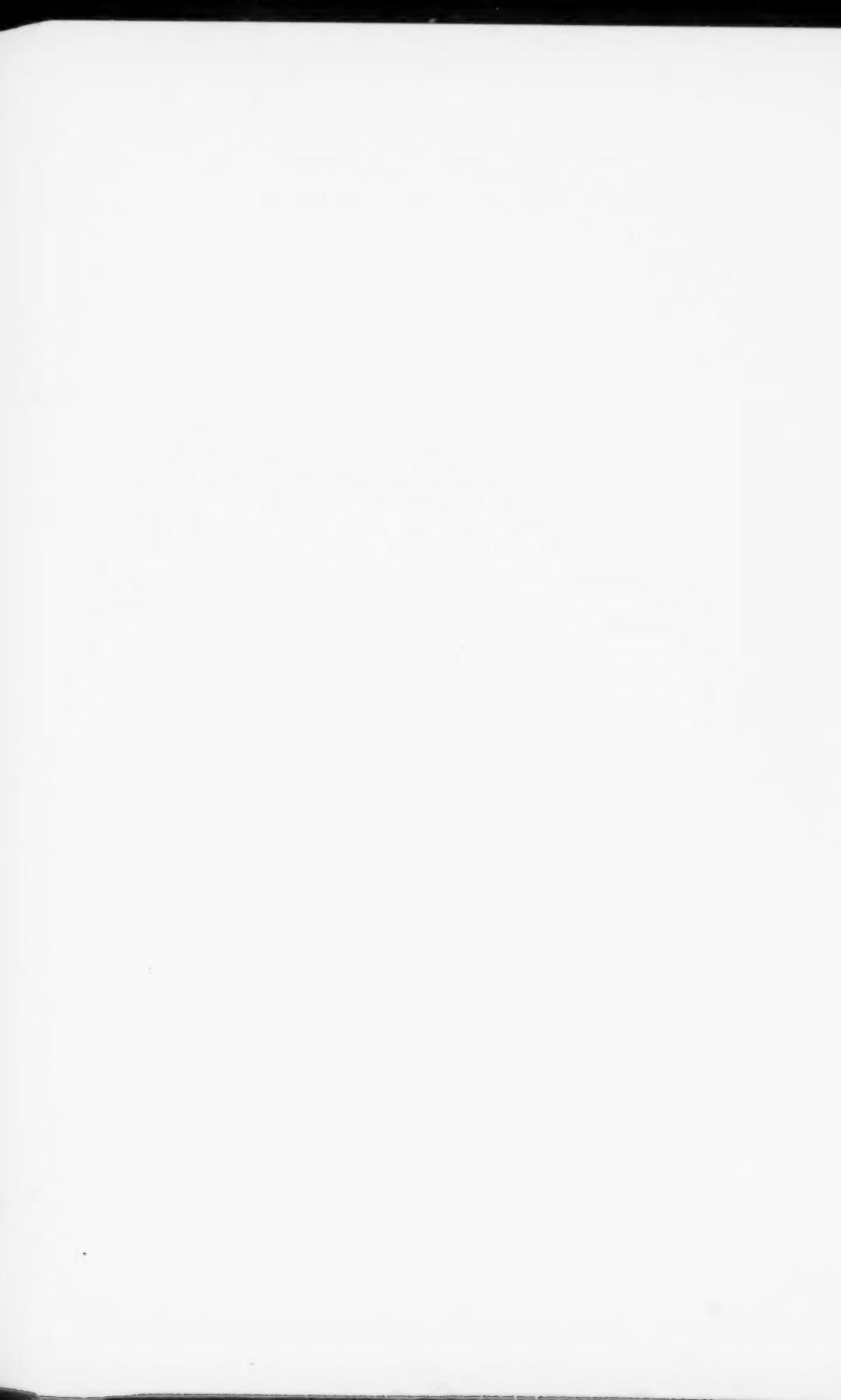
The testimony was conflicting as to the source of the \$11,000 down payment. Peter testified that the source was a loan from his mother, Mrs. Fink, Sr. Susanne testified that the down payment came from community funds, i.e., her earnings from teaching which were withdrawn from their joint account. At that time Susanne had no bank account of her own. Susanne testified that she did not know that the \$11,000 down payment originated as a loan from Peter's mother. She denied signing any promissory



note evidencing such a loan. However, Susanne admitted that her signature was affixed to the promissory note to Peter's mother for \$11,000 signed August 27, 1973, by Peter and Susanne, which was Exhibit 5 at trial. Exhibit 5 was admitted into evidence without objection.

Community funds were used to pay the \$450 monthly payments for the condo. When the condo was bought, Peter's annual income was about \$45,000, and Susanne was not working.

Title to the condo was taken in Susanne's name as her separate property. Susanne testified that she wanted to buy the condo as an investment because Peter was going to buy a new airplane. According to Susanne, Peter and a few others were going to buy a new airplane for \$3,000 or



\$4,000. However, she later testified that she did not "know what it was."

Susanne testified that it was not safe for their two-year old son to continue to live with Susanne's mother at the latter's house in Glendale on a busy, four-lane highway. But she denied that the condo was for the family. When asked if she and her family were going to move into the condo and use it as their residence, however, she replied: "yes and no."

Peter testified that title to the condo was taken in Susanne's name solely to protect the family because in 1971, two years previous, he had been named as a defendant in a lawsuit for \$50,000 arising from his activities as an employee of Shearson Hammill. At that time his net income was less than \$50,000. He felt



threatened by the lawsuit because his employer would not cover any judgment against him. After discussing the problem with Susanne, he placed the title in her name in order to protect the condo from creditors. Susanne testified that in 1973, she was not aware of the lawsuit against Peter.

Peter testified that he had joined the flying club in San Fernando Valley in 1973 for a total investment of \$475 plus \$40 per month fee. The club owned two planes.

In 1975, Susanne and Peter decided to sell the condo and use the proceeds from the sale as a down payment on the purchase of the Cortez house, because they wanted a larger home. The lawsuit mentioned above had been settled before the purchase of the Cortez house. However, Peter, placed title



to the Cortez house in Susanne's name as her sole and separate property in order to protect the family because he had no insurance, feared potential creditors in his business, and was a "shooting duck."^{1/} [See pg. A-15 for footnotes]

U.S. Life Savings and Loan, the lender for the Cortez house purchase, required both Susanne and Peter to sign all the necessary loan documents, including financial statement, application for the loan, and note and deed of trust. However, Peter was the principal earner in the family. These documents along with Peter's quitclaim deed to Susanne were admitted into evidence as Exhibit 4 without objection.

Monthly payments on the Cortez house came primarily from Peter's earnings during

the marriage. Peter testified that he never intended to relinquish his interest in the condo and the Cortez house and that Susanne knew this to be the case just as she knew why title had been placed in her name.

At the conclusion of the trial, the court found that the Cortez house was the community property of Susanne and Peter and that title had been placed in Susanne's name pursuant to the agreement of Susanne and Peter solely to avoid or defraud creditors.

On March 23, 1988, Susanne filed a request for statement of decision. An "Amendment to Request for Statement of Decision" was received by the court on March 24, 1988.

Peter's counsel was ordered to prepare a proposed judgment and statement of

decision. On April 20, 1988, the proposed statement of decision was prepared by Peter's attorney was signed by the court and filed. On April 24, 1988, Susanne's attorney filed a proposed judgment. On the same date, Susanne filed objections to the proposed statement. She then filed a motion to set aside "if necessary" Peter's statement of decision and to have her objections deemed timely filed. On May 12, 1988, Peter's response was filed. After hearing on the objections on May 24, 1988, the court took the matter under submission. On June 7, 1988, the court re-adopted Peter's proposed statement of decision which had been signed by the court and filed on April 20, 1988. The "Further Judgment" was signed by the trial judge and was filed on June 7, 1988.

ISSUE PRESENTED

The sole issue raised on this appeal is whether the court's finding that the Cortez house was the community property of Peter and Susanne is supported by substantial evidence.^{2/} [See pg. A-168 for footnote]

DISCUSSION

"A trial court's findings regarding a property's separate or community character is binding and conclusive on review when supported by substantial evidence [citations], even though evidence conflicts or supports contrary inferences.

[Citations.]" (In re Marriage of Grinius (1985) 166 Cal.App.3d 1179, 1185.)

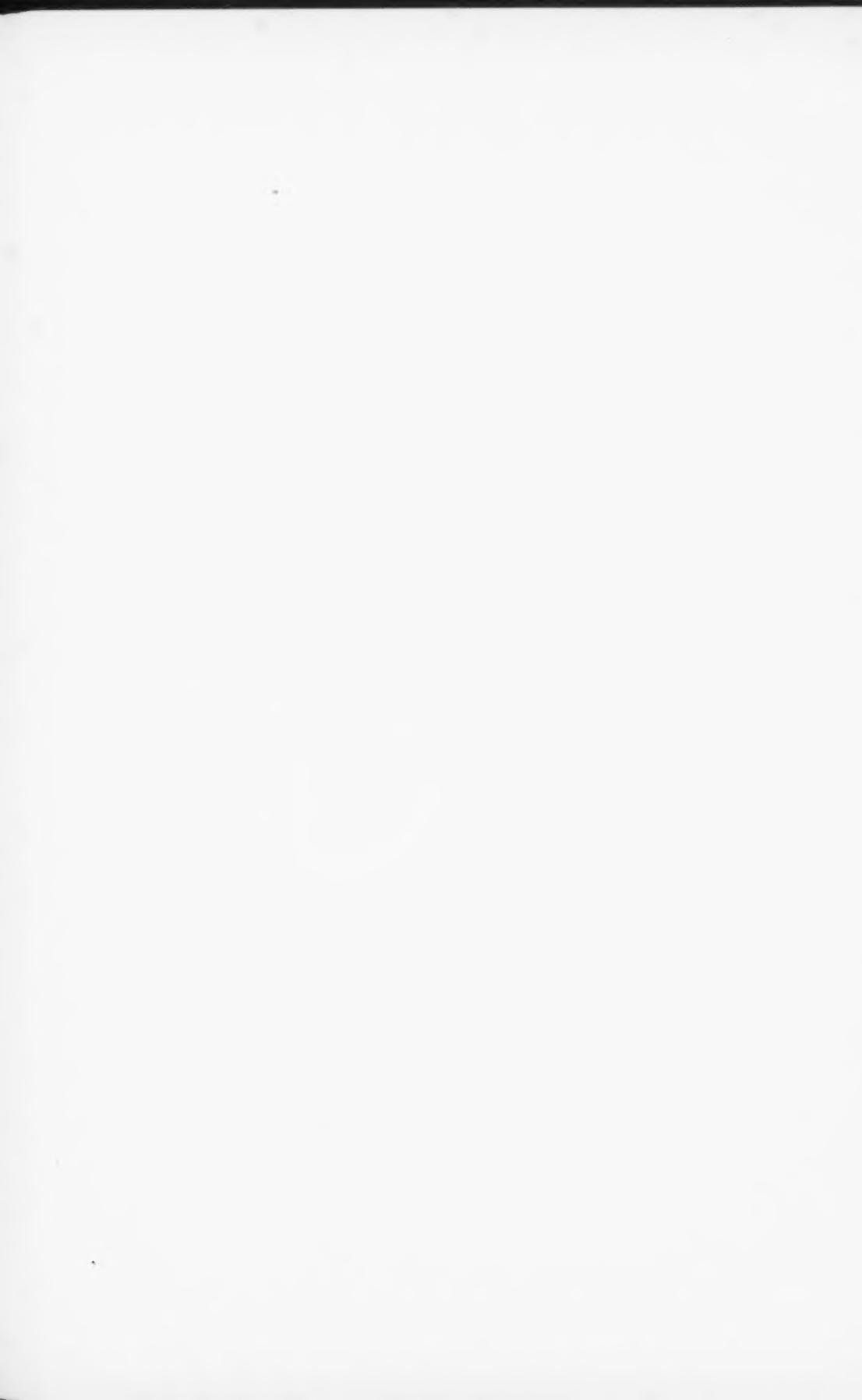
Based on our review of the record we conclude that substantial evidence supports the trial court's findings that the Cortez



house was community property.

The record reflects that record title to both the condo and the Cortez house was taken in Susanne's name as her separate property. "While our courts presume an ownership interest in property is as stated in title [citations], this presumption may be dispelled by an agreement between the parties that the respective interests should be otherwise." (Id. at pp. 1189-1190.)

There is ample evidence in the record to support the trial court's finding that the presumption of separate property was rebutted in this case. That evidence established the community nature of the funds used to acquire the Cortez house and the lack of donative intent on the part of Peter. (See, e.g., In re Marriage of



Frapwell (1975) 49 Cal.App.3d 597, 601.)

The source of the funds was clearly community property. The down payment for the Cortez house was traced to the price paid for the condo, which had been acquired through community property resources. The lender for the balance of the Cortez house purchase price looked solely to the community for repayment of the loan.

(Gudelj v. Gudelj (1953) 41 Cal.2d 202, 210; In re Marriage of Grinius, supra, 166 Cal.App.3d 1179, 1186-1187.)

At trial Peter expressly testified that he had discussions with Susanne about placing title to the condo and the Cortez house in her name for protection against creditors. In his deposition Peter testified that he did not remember any



discussions. However, during trial he explained that although his deposition testimony was accurate, what he meant was simply that he "did not recall a specific hour, a specific conversation, a specific date that something transpired. That's why [he] answered that way, but, in fact, [he and Susanne] had to have and [they] did, in fact, have those conversations." (See, e.g., In re Marriage of Stitt (1983) 147 Cal.App.3d 579, 582-582.)

DECISION

The judgment is affirmed.

NOT TO BE PUBLISHED

DANIELSON, J.

We concur:

KLEIN, P.J.

ARABIAN, J.



1/ On October 27, 1989, this court denied Susanne's request for judicial notice of certain documents attached to her reply brief. Matters set forth in the briefs are not of record. We are unable to consider the exhibits introduced into evidence at trial since they are not a part of the record on appeal.

{Footnote Two at page A-16}



2/ We reject, as patently unsound, Susanne's claim that the Cortez house must be deemed to be her separate property on the theory that to characterize it as community property would impermissibly reward Peter's illegal attempt to defraud creditors. To the contrary, if the property were deemed to be Susanne's separate property, then creditors, if any, would be defrauded since Peter's interest in the house would be immune from creditors' liens. Moreover, Susanne's reliance on The Security Exchange Act of 1934 and related cases, e.g., Boruski v. Securities and Exchange Commissionm (2d Cir. 1965) 340 F.2d 991, is patently misplaced. Peter's duty, as a broker, under that Act is owed to his clients, not to his spouse, Susanne.



A-17

(DENIED JANUARY 5, 1990)

THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

SUSANNE C. FINK,)	No. 2 Civil B036724
)	D 129206
Appellant,)	
)	
v.)	
)	
PETER FINK,)	
)	
Respondent.)	
)	
)	
)	

PETITION FOR REHEARING



TABLE OF AUTHORITIES

United States Constitution:
Article VI, cl 2 (Supremacy Clause)

Federal Statutes:

**Title 15 USCA (The Securities Exchange
Act as Amended)**

Cases:

Boruski v. Securities and Exchange
Commission,
(2d Cir 1965) 340 F2d 991.....

In re Burrus, 136 US 586, 593-594,
34 L Ed 500,
10 S Ct 850 (1890)

Hisquierdo v. Hisquierdo,
439 US 572, 59
L Ed 2d 1, 99 S Ct 802.....

Ohio ex rel Popovici v. Adler,
280 US 379 74
L Ed 489, 50 S Ct 154 (1930)

Rose v. Rose, 481 US 619,
95 L Ed 2d 599,
107 S Ct 2029.....

United States v. Yazell, 382 US 341,
352, 15 L Ed 2d 404, 86 S Ct 500 (1966)

Wetmore v. Markoe, 196 US 68,77,
49 L Ed 390,
25 S Ct 172 (1904)



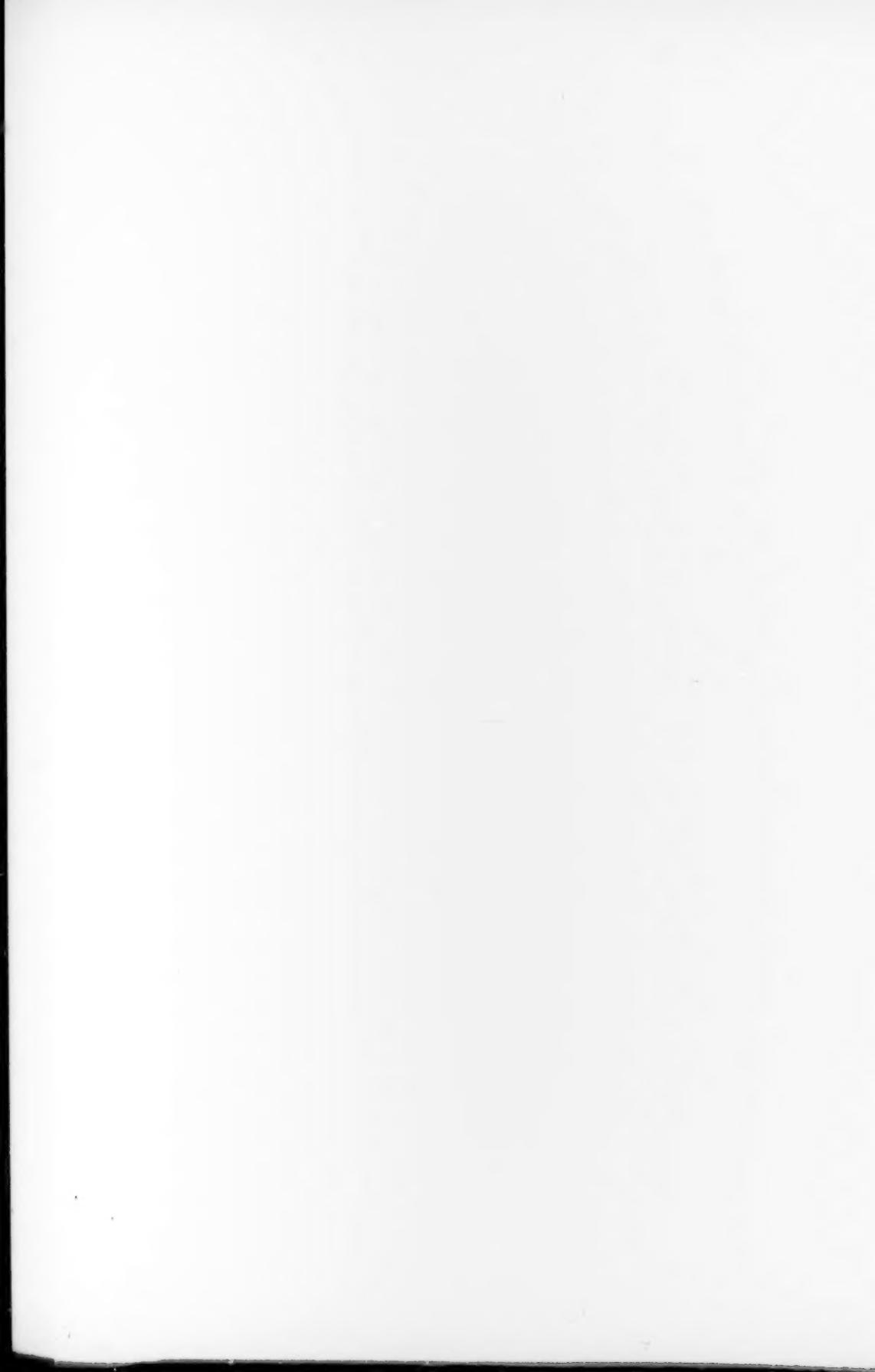
TOPICAL INDEX

POINT I. The State family-property law (upon which the decision of the Court filed November 22, 1989 is based) does "major damage" to "clear and substantial" federal interests under The Security Exchange Act of 1934 (15 USCA) (and its vital regulation of registered representatives - stock brokers - and its disclosure and financial reporting provisions) and must be overridden because of the requirements of said Act and also under the Supremacy Clause (Art VI, cl2). The decision permits registered representative brokers to conceal assets from required disclosure (in this instance by placing assets in the name of a spouse). The decision denies that the duty of



registered brokers is to the act and that brokers have a duty at all times to comply with all requirements of said Act even if they do not have clients. See: United States v. Yazell, 382 U.S. 341, 352, 15 L.Ed. 2d 404, 86 S.Ct. 500 (1966).
Hisquierdo v. Hisquierdo, 439 U.S. 572, 59 L Ed.2d 99 S.Ct. 802.

POINT II. The State family-property law (upon which the decision of the Court filed November 22, 1989 is based) is overridden by federal statute. Congress has in essence "positively required by direct enactment" of the said Securities Act of 1934 as amended that State law (Insofar as it relates to stock brokers who are registered representatives under the Securities Act) has to be considered preempted so that



this Court has no jurisdiction under State family-property law to adjudicate that a stock broker husband retained a community property interest in a parcel of real property, where the judgment of the Trial Court found that in 1975 title had been placed by the stock broker husband in the name of the wife as her sole and separate property "for the purposes of avoiding or defrauding creditors" who were clients of the stock broker husband.



POINT III. The State

family-property law (upon which the decision of the Court filed November 22, 1989) is based does "major damage" to "clear and substantial" federal interests under The Security Exchange Act of 1934 (15 USCA) (and its vital regulation of registered representatives) where the decision:

(a) Assumes without any evidence that there are "creditors' liens" when there are none testified to by any witness, and assumes in reality that any creditors have had notice so they could initiate joinder proceedings, and

(b) Assumes that a broker who openly alleges he has hidden his property in his wife's name for 10 years will now use this



property to pay any creditors instead of immediately hiding it again, and

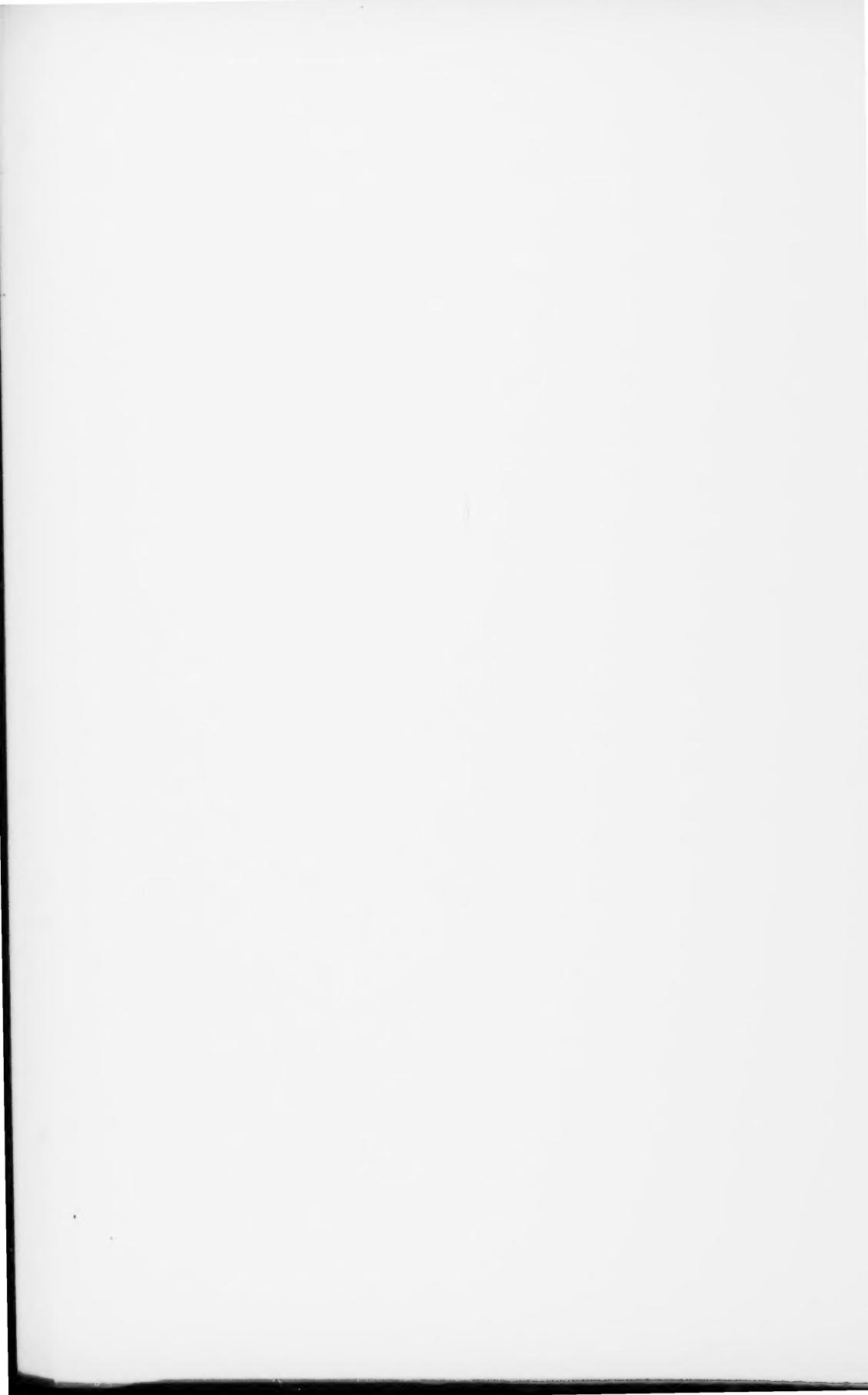
(c) Accepts as valid State family-property law the legal conclusion that a stock broker fiduciary can at any time violate the SEC Act for any reason, whether or not such registered broker has now or has ever had a client and as if the said Security Exchange Act can safely be so limited in its scope by limiting the duties of the registered representatives to actual known clients without defeating entirely its primary stated purposes, and opening a vast gap for evasion of the Act.



POINT IV. The fact that the State law of California (upon which the decision filed November 22, 1989 is based) may limit the duties of attorneys and accountants and other fiduciaries licensed under the laws of this State (so they can conceal assets from clients by placing such assets in the names of their spouses and others to be retrieved years later in legal proceedings when safe from the creditors and clients) can not affect Federal legislation that places direct duties on registered representatives (stock brokers) who are licensed under the said SEC act since such stock brokers have a duty to comply with the Securities Act whether they have clients or not and without regard to variations in state family-property law.



Otherwise "major damage" will be done to the "clear and substantial" federal interest in having stock brokers and stock brokerage firms and stock exchanges perform their vital national functions with total compliance with the said SEC act without assuming there are narrower state interpretations which limit their duties to the Act.



ARGUMENT

The Opening Brief of Appellant raised as its primary contention that specific provisions of Title 15 (The Securities Exchange Act of 1934 as amended) were clearly violated by Peter, as a "registered representative" and argued basically that such violations of Federal law were determinative.

The Court (Page 7 of its decision Footnote 2) stated:

"We reject, as patently unsound, Susanne's claim that the Cortez house must be deemed to be her separate property on the theory that to characterize it as community property would impermissibly



reward Peter's illegal attempt to defraud creditors. To the contrary, if the property were deemed to be Susanne's separate property, then creditors, if any, would be defrauded since Peter's interest in the house would be immune from creditors' liens. Moreover, Susanne's reliance on The Security Exchange Act of 1934 and related cases, e.g., Boruski v. Securities and Exchange Commission, (2d Cir. 1965) 340 F.2d 991 is patently misplaced. Peter's duty, as a broker, under that Act is owed to his clients, not to his spouse, Susanne."

The following Federal authority further defines the position of appellant with reference to her primary issue, rejected by the Court in the above footnote:

In Hisquierdo v. Hisquierdo 439 WS 572, 59 L Ed 2d 1, 99 S Ct 802, it is stated:

"Insofar as marriage is within temporal control, the States lay on the guiding hand. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States". In re Burrus, 136 US 586, 593-594, 34 L Ed 500, 10 S.Ct. 850 (1890). Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question. See, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 74 L.Ed 489, 50 S.Ct. 154 (1930). On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the



Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted, Wetmore v. Markoe, 196 U.S. 68, 77, 49 L.Ed 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966). . . .



A-30

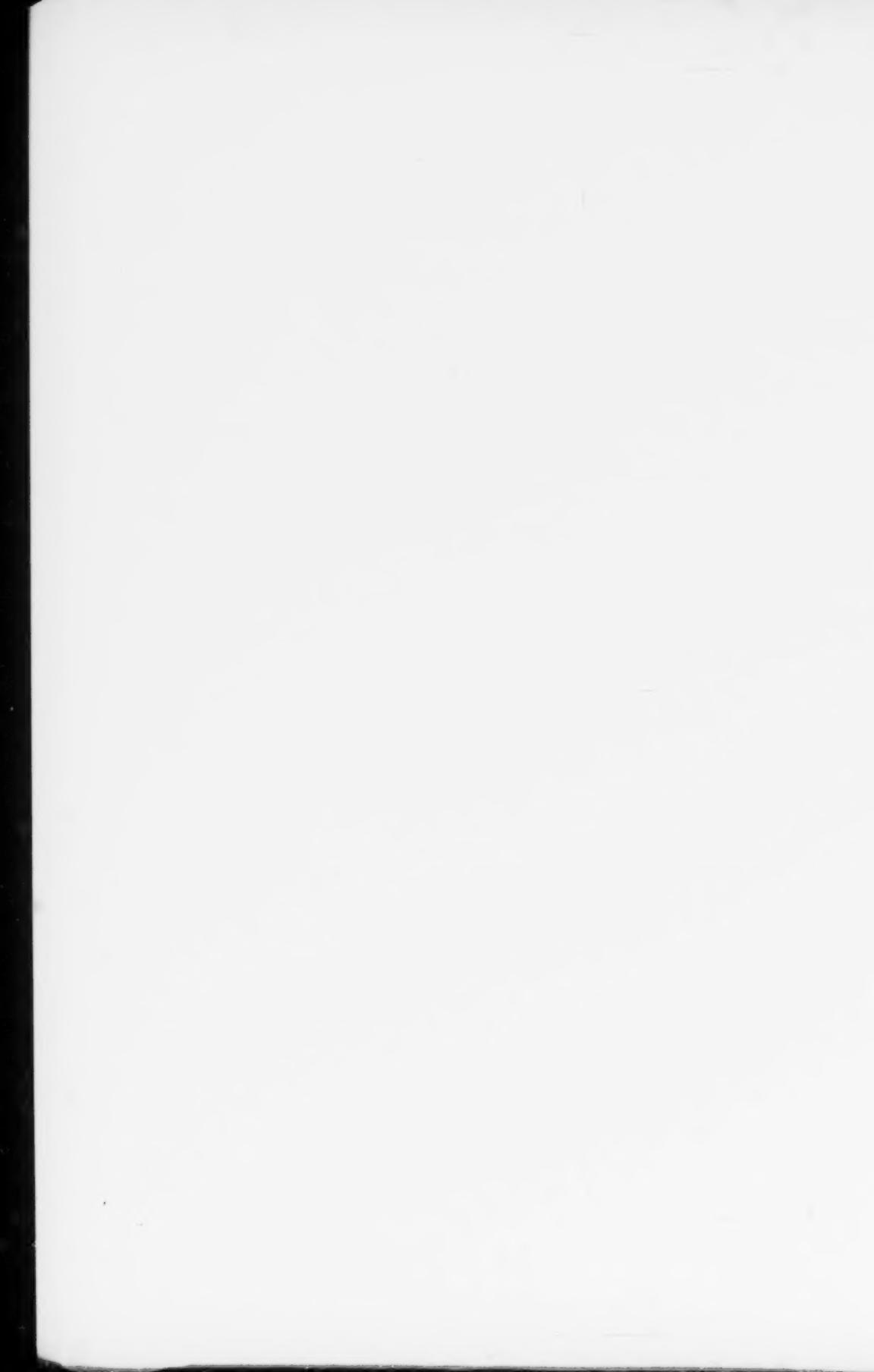
CONCLUSION

It is respectfully requested that this petition be granted and that a rehearing be had on the points specified herein, which are directed to the footnote of this Court quoted above.

Dated: December 5, 1989

By


CHESTER LEO SMITH
Attorney for Appellant
Susanne C. Fink



A-31

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION THREE,
NO. B036724 S013481

IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA

IN BANK

PETER FINK, Respondent

v.

SUSANNE C. FINK, Appellant

APPELLANT'S PETITION FOR REVIEW DENIED

FEB 14 1990
LUCAS

Chief Justice



VERIFICATION

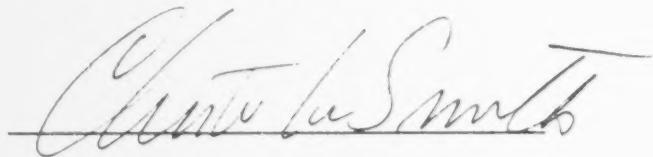
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, and know its contents.

I am the attorney of record for the PETITIONER. The Petition and STATEMENT OF THE CASE state accurately the proceedings below. The Reasons For Granting the Writ are meritorious. Each and all of the documents referred to in any APPENDIX are true copies of original documents. CHESTER LEO SMITH is a member of the Bar of the Supreme Court of the United States. ANN L. SMITH is not now a member of such Bar.

}

Executed on APRIL 28, 1990 at Los Angeles, California, by Chester Leo Smith, who declares under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

A handwritten signature in cursive ink, appearing to read "Chester Leo Smith". The signature is written over two lines, with "Chester" on the first line and "Leo Smith" on the second line. There is a small vertical mark or flourish above the "i" in "Leo".

CHESTER LEO SMITH

{

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen, and not a party to the within action; my business address is 12121 Wilshire Blvd., Suite 1103, Los Angeles, CA 90025.

I served the following document described as:

PETITION FOR WRIT OF CERTIORARI

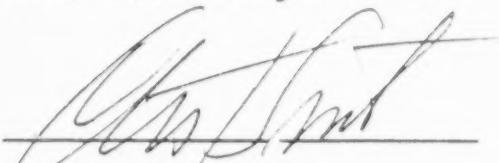
TO THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

On MAY 5, 1990 in this action by mailing true copies in the number as required by the Rules of the Supreme Court, at a United States Post Office of the United States of America, located in sealed postage prepaid envelopes as stated on the



attached mailing list. I declare I am a member of the Bar of the Supreme Court. I have mailed said copies to comply with the Rules of this Court, including Rule 28.



CHESTER LEO SMITH



The Supreme Court of California
3580 Wilshire Blvd.
Los Angeles, Ca. 90010

The Court of Appeal of California
Second Appellate District
3580 Wilshire Blvd.
Los Angeles, Ca. 90010

The Honorable Barbara Jean Johnson
Superior Court
County Courthouse
111 N. Hill
Los Angeles, Ca. 90012

Schenck and Edelman
10880 Wilshire Blvd. Suite 508
Los Angeles, Ca. 90024

Supreme Court, U.S.
F I L E D
MAY 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1730

In The
Supreme Court of the United States
October Term, 1989

SUSANNE C. FINK,

Petitioner,

v.

PETER FINK,

Respondent.

On Petition for Writ of Certiorari To
The Court of Appeals of The State
of California, Second Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

JOHN D. SCHENCK
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10880 Wilshire Boulevard
Suite 508
Los Angeles, CA 90024
(213) 470-6322

Attorneys for Respondent



QUESTIONS PRESENTED

1. Whether federal law is limited by a state trial court's decision holding a family residence of the parties to be their community property and by so doing voiding as a fraud on creditors an oral agreement between the marital parties concerning title to said residence.
2. Whether the Securities and Exchange Act of 1934 preempts a state court's jurisdiction over the acts, conduct and agreements between a husband and wife as to their marital property merely because the husband was employed as a stockbroker at the time of the transaction but where he did not deal with his wife in a position of stockbroker and client.
3. Whether when brought to the attention of the state appellate court for the first time on appeal, the duties of a stockbroker to his clients as delineated under the Securities and Exchange Act of 1934 are relevant and preempt a trial court's jurisdiction to adjudicate marital property as property to be held by them as tenants-in-common where the transaction between husband and wife does not fall within the purview of the Act.
4. Whether a state appellate's decision breaches the integrity of the Securities and Exchange Act of 1933 (15 U.S.C., Section 77a, et seq.) and the Securities Act of 1934 (15 U.S.C., Section 78a, et seq.) where it held as irrelevant the applicability of said statutes to real property held pursuant an oral agreement between a husband and a wife where such agreement was held by the trial court to be fraud upon the creditors of the marital community.

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In The
Supreme Court of the United States
October Term, 1989

SUSANNE C. FINK,

Petitioner,

v.

PETER FINK,

Respondent.

On Petition for Writ of Certiorari To
The Court of Appeals of the State
of California, Second Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

The ground for the Petition is Petitioner's contention that the State Appellate Court erred in upholding a trial court's decision which voided as a fraud on creditors an executed oral agreement of parties and as a result thereof ruled that subject real property of the parties be held Petitioner's and Respondent's tenancy in common.

OPINIONS BELOW

The opinion of the District Court of Appeals of the Supreme Court, Second Appellate District was rendered

on November 22, 1989. Rehearing was subsequently denied. Petitioner's Petition for Review to the California Supreme Court was denied on February 14, 1990.

JURISDICTION

Petitioner claims this court's jurisdiction by Article VI, Clause 12 of the United States Constitution and the holding of *Hisquierdo v. Hisquierdo*, 349 U.S. 572 (1979).

STATEMENT OF THE CASE

Respondent adopts by reference the statement of the case contained in the opinion of the Court of Appeal of the State of California, 2nd Appellate District, set forth in Appendix to the Petition at A-2 to A-16, inclusive.

ARGUMENT

Petitioner is seeking to persuade this Court that a federal issue of law applies on the sole basis of Respondent's occupation as a stockbroker when he entered into an agreement with his wife, thereby violating a statutory duty to the 1934 Act, which agreement the trial court found to be a fraud on the creditors of the parties. The Petitioner seeks to have this court effectuate an agreement of the parties designed to defraud their creditors and thereby reward Petitioner on the basis that Respondent defaulted in his duties to his clients as promulgated by the 1934 Act.

POINT I

Respondent contends that the 1934 Act was never intended to extend to dealings between husband and wife in a non-security context. Respondent further contends that this court is not the forum in which the punishment or adjudication of his activities with his wife should take place. The fact that Respondent was, during the marriage, a licensed broker under the 1934 Act, is irrelevant to the issues before the trial and appellate courts. No issues concerning the applicability of the 1934 Act or regulation promulgated thereunder are involved. No federal issues are involved. The trial court had appropriate jurisdiction over the person of Respondent and Petitioner and their property to adjudicate the marital relationship and the agreements between them.

By refusing to enforce the oral agreement between the parties, which the trial court found to be illegal, the trial court negated the effect of the purported title transfer to Petitioner and placed the parties back where they were prior to the agreement. By finding that at that time of the agreement, the property was the community property of the parties, the court appropriately found that the property involved was the community property of the parties at the time of the trial and to be henceforth held by them as tenants-in-common.

POINT II

The California Appellate Court's decision in its footnote number 2 (Petitioner's Petition for Writ of Certiorari, page A-16), states:

"We reject as patently unsound, Susanne's claim that the Cortez house must be deemed to be her separate property on the theory that to characterize it as community property would impermissibly reward Peter's illegal attempt to defraud creditors. To the contrary, if the property were deemed to be Susanne's separate property, then creditors, if any, would be defrauded, since Peter's interest in the house would be immune from creditor's liens. Moreover, Susanne's reliance on The Securities Exchange Act of 1934 and related cases, e.g., Boruski v. Securities and Exchange Commission (2d Cir 1965) 340 F.2d 991, is patently misplaced. Peter's duty, as a broker, under that Act, is owed to his clients, not to his spouse, Susanne."

The basis of Petitioner's claim is solely founded on the nature of Respondent's employment as a licensed stockbroker. It is acknowledged that Respondent has defined obligations to his brokerage customers and to specific regulatory agencies which govern his employment. These, however, are not the same duties he owed to his wife. Respondent's and Petitioner's agreement concerning their residence is outside the scope of the Securities and Exchange Commission or any other agency which governs his employment or the 1934 Act. His conduct towards his wife (as a husband and where she is not a business customer of Respondent) is governed by state law. The California court made no finding, nor did its Judgment in this matter adjudicate any aspect of Respondent's employment or any of the rules and regulations of a securities broker.

POINT III

The case of *Boruski v. Securities and Exchange Commission*, 340 F 2d 991 (2d Cir. 1965), was a review of particular disciplinary action taken by the Securities and Exchange Commission against a broker for alleged violations of his duties as a broker. It was a proceeding between the regulatory agency and an individual subject to the rules of that agency involving acts of his employment. The issue was the reasonableness of the regulations and the proceedings of the commission. The case dealt with Mr. Boruski's conduct as a broker not as a husband. The Appellate Court found that the punishment was warranted and the regulations reasonable.

Petitioner can find little solace in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 59 L Ed 489 (1979). The preference of jurisdiction in divorce matters is with the state courts. In the *Hisquierdo* case, a particular act of Congress, the Railroad Retirement Act of 1974 was involved. The state court attempted to allocate the husband's retirement account in the plan between the husband and wife (husband was a railroad employee). This court stated that the state court did not have the jurisdiction to allocate the husband's interest in the exclusively federally created plan; one created by an Act of Congress and which, by its own terms, excluded any state process.

The case at the bar is entirely different. The agreement with Respondent and his wife with respect to how title would be held to their home does not involve Federal Law. The fact that Respondent was a stockbroker is irrelevant to the issue, since he was not dealing with his wife in these circumstances as a securities client.

In those few cases involving divorce and federal issues, this court consistently found that federal preemption applies in only the most unusual circumstances. In *Hisquierdo*, it was an issue involving a specific Act of Congress; the Railroad Retirement Act of 1974; in *United States v. Yazell*, 382 U.S. 341 (1966), it precluded a state court from changing the terms of federally issued bonds. However in *Ohio ex rel Popovici v. Adler*, 280 U.S. 379 (1930), the State was the appropriate jurisdiction with respect to a divorce action between the United States citizen wife against the husband, a citizen of Romania, notwithstanding Article III of Section II of the United States Constitution.

In other federally related matters, the state court's jurisdiction in marital issues was upheld, notwithstanding incidental Federal interests. In *Rose v. Rose*, 481 U.S. 619 (1987), this court affirmed the state's jurisdiction to hold a disabled veteran in contempt and permitted the issuance of a writ of execution for the collection of past child support upon his U.S. disability payments. In *Wetmore v. Markoe*, 196 U.S. 68 (1904), both spousal and child support were held to be nondischargeable in bankruptcy and not in conflict with the bankruptcy act as established by federal statute.

Under California law, testimony is permissible to establish an oral agreement between a husband and a wife, which agreement may vary the terms of a written document. See *In re Marriage of Frapwell*, 49 Cal App 3d 597, 601 (1975). The trial court found the agreement between Petitioner and Respondent existed, negated it and placed the parties into their preagreement position.

The State Court did nothing to limit or rule upon Respondent's duties as a stockbroker under the 1934 Act. The state decision did not condone nor license registered brokers to conceal assets or to do anything illegal. The court, by affirming the trial ruling, did not enforce an agreement between a Husband and a Wife, which was fraudulent.

Petitioner's contention to creditor liens and the fact that there was no evidence that Respondent would pay creditors instead of immediately hiding assets once again as raised in page 22 of the Petition is irrelevant. The trial court did not rule on Respondent's conduct as a stockbroker. The trial court ruled that the Cortez residence was the community property of the parties, and the oral agreement concerning the property was unenforceable. As a result of the trial court's judgment, the parties were to hold the property as tenants-in-common. To hold the Cortez residence as Petitioner would accomplish the fraudulent act of the parties. Petitioner's statement in paragraph C on page 23 of her petition is without foundation. The decision makes no reference to nor seeks to apply to any relationship of a stockbroker to his clients nor to the duties of a stockbroker to his customers under the 1934 Act.

POINT IV

Point IV is the claim. Petitioner wanted the District Court of Appeals of the State of California and the California Supreme Court to punish Respondent. She wants the court to reward her for her own wrongdoing by

permitting her to solely benefit by a fraudulent agreement with Respondent. The court of California appropriately would not permit Petitioner to so benefit.

CONCLUSION

Respondent respectfully submits that certiorari should be denied, that this court should put this matter to final rest by finding that this is a state issue involved dealing with state marital property of which there is no federal interest in this circumstance.

Respectfully submitted,

SCHENCK & EDELMAN

BY: /s/ John D. Schenck

JOHN D. SCHENCK,
Attorneys For Respondent,
Peter Fink

